

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: CATHODE RAY TUBE (CRT)
ANTITRUST LITIGATION

) MDL No. 1917

) Case No. C-07-5944-SC

This Order Relates To:

Sharp Electronics Corp., et al. v.
Hitachi, Ltd., et al., 13-cv-1173-
SC

Dell Inc., et al. v. Hitachi,
Ltd., et al., 13-cv-02171-SC

ALL DIRECT PURCHASER ACTIONS

) ORDER RE: DELL'S AND
) SHARP'S ADMINISTRATIVE
) MOTIONS TO CONFIRM THEIR
) OPT OUT REQUESTS OR, IN THE
) ALTERNATIVE, FOR AN
) ENLARGEMENT OF TIME TO OPT
) OUT

I. INTRODUCTION

Now before the Court are administrative motions by Sharp Electronics Corporation and Sharp Electronics Manufacturing Company of America, Inc. ("Sharp") and Dell Inc. and Dell Products L.P. ("Dell") to confirm their request to opt out from the Direct Purchaser Plaintiffs' ("DPPs") proposed settlement with the SDI and Hitachi Defendants¹ ("Proposed Settlements") or for a retroactive

¹ The SDI Defendants include Samsung SDI Co. Ltd. (f/lk/a Samsung Display Devices Co., Ltd.), Samsung SDI America, Inc., Samsung SDI Brasil, Ltd., Tianjin Samsung SDI Co., Ltd., Samsung Shenzhen SDI Co., Ltd., SDI Malaysia Sdn. Bhd., and SDI Mexico S.A. de C.V. (collectively "SDI"). The DPP's proposed settlement with Hitachi includes Hitachi, Ltd., Hitachi Displays, Ltd. (n/k/a Japan Display Inc.), Hitachi America, Ltd., Hitachi Asia, Ltd., and Hitachi

1 extension of the time to opt out. ECF Nos. 2696 ("Dell Mot."),
2 2698 ("Sharp Mot."). Hitachi opposes the motion. ECF Nos. 2712
3 ("Dell Opp'n"), 2713 ("Sharp Opp'n"). DPPs also filed a responsive
4 brief in support of the motion. ECF No. 2715 ("DPP Br."). The
5 motion is fully briefed and ripe for disposition without oral
6 argument. Civ. L.R. 7-1(b); 7-11. For the reasons set forth
7 below, Dell's motion is GRANTED and Sharp's motion is DENIED.

8 9 **II. BACKGROUND**

10 The parties are familiar with the factual and procedural
11 background of the case, so an exhaustive review is unnecessary.
12 The facts relevant to the motion are set forth below. Defendants
13 are allegedly manufacturers of cathode ray tubes ("CRTs") and, in
14 some cases, of finished products as well. In March 2013, Sharp
15 filed a direct action suit against a host of defendants including
16 the Settling Defendants. ECF No. 1604-2. In June 2013, Dell filed
17 its First Amended Complaint, also asserting claims against the
18 Settling Defendants. ECF No. 1726.

19 On April 14, 2014 the Court granted provisional certification
20 to a class in the Proposed Settlements. ECF No. 2534.
21 Subsequently, the Settlement Administrator set the deadline to opt
22 out of the Proposed Settlements for June 12, 2014. The Settlement
23 Administrator mailed notice to the class members including two
24 addresses for Dell and eight addresses for Sharp. ECF Nos. 2712-1
25 ("Murray Dell Decl.") ¶¶ 3-4; 2713-1 ("Murray Sharp Decl.") ¶¶ 3-4.
26 One of Dell's notices was returned as undeliverable. Murray Dell

27 Electronic Devices (USA) Inc. (collectively, "Hitachi"). SDI and
28 Hitachi are collectively referred to as the "Settling Defendants."

Decl. ¶ 4. None of the Sharp notices were returned. Murray Sharp Decl. ¶ 4. The Settlement Administrator also published notice in the Wall Street Journal, established a website with copies of the relevant notices and a Frequently Asked Questions page with the June 12 deadline, and activated a toll-free telephone line with customer service representatives available to answer questions related to the class settlement. Id. at ¶ 6-8.

Before, during, and after the June 12 deadline, both Dell and Sharp have been actively litigating against the Settling Defendants. See Dell Mot. at 1-2 (describing Dell's active participation in discovery); Sharp Mot. at 1-2 (discussing Sharp's litigation against the Settling Defendants). Nonetheless, neither Dell nor Sharp sent an opt out notice to the Settlement Administrator by the June 12 deadline. Instead, on June 26, 2014, after DPPs' counsel contacted counsel for Dell and Sharp and pointed out that opt out requests had not been received from either company, Dell and Sharp immediately submitted opt-out requests. ECF No. 2715-1 ("Saveri Decl.") ¶¶ 3, 6. As a result, both Dell and Sharp were included on the list of opt-outs filed by the DPPs on the court-ordered deadline of June 26, the earliest date on which the Settling Defendants were notified of the list of opt-outs. Id. at ¶ 6. Twelve days later, counsel for both Sharp and Dell contacted SDI and Hitachi's counsel seeking to stipulate to an extension of the opt-out deadline, but Hitachi refused. ECF No. 2698-1 ("Benson Decl."), ¶ 6.

Sharp and Dell now bring these motions seeking alternatively to confirm that their June 26 opt-out was effective or to retroactively extend the opt-out deadline. Hitachi opposes.

1 **III. DISCUSSION**

2 Sharp and Dell make two largely identical arguments in support
3 of their motions. First, they argue that their actions before,
4 during, and after the opt-out deadline sufficiently demonstrated
5 their intent to be excluded from the settlement class. Sharp Mot.
6 at 3-4; Dell Mot. at 3-4. Accordingly, they ask the Court for an
7 order confirming their status as opt-outs from the Proposed
8 Settlements. Alternatively they contend that even if their
9 demonstration of intent to opt out is insufficient, this is a case
10 of excusable neglect and good cause exists for the Court to order
11 an enlargement of time under Federal Rule of Civil Procedure 6(b).
12 Sharp Mot. at 4-5; Dell Mot. at 4-5. The Court will analyze
13 Sharp's and Dell's second argument first. Finding Sharp's neglect
14 inexcusable but Dell's excusable, the Court then turns to the
15 parties' first argument.

16 **A. Excusable Neglect**

17 District Courts have discretion to grant retroactive
18 enlargements of time under Federal Rules of Civil Procedure 6(b)
19 and 60(b)(1) provided a party shows their neglect in missing the
20 applicable deadline was excusable. In determining whether the
21 parties have shown excusable neglect, the Court considers four
22 factors (the "Pioneer factors"): (1) the danger of prejudice to the
23 nonmoving parties, (2) the length of delay, (3) the reason for the
24 delay, and (4) whether the movant acted in good faith. Pioneer
25 Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395
26 (1993); Silber v. Mabon, 18 F.3d 1449, 1455 (9th Cir. 1994).

27 Dell and Sharp both argue they have satisfied each of these
28 factors. First, Dell and Sharp argue that because they were

1 included in the report on exclusions, the first time the Settling
2 Defendants received information regarding the identify of the opt-
3 outs, the Settling Defendants will not be prejudiced if they are
4 permitted to opt out. Furthermore, Dell and Sharp argue that their
5 delay was minimal -- their opt-out request was postmarked and
6 received 14 days after the opt-out deadline. As to the third
7 factor, the reason for the delay, Dell argues that while they
8 repeatedly checked the Settlement Administrator's "dates to
9 remember" page, the page was never updated to include the opt-out
10 deadline for this particular settlement. Coupled with the
11 ostensible failure of Dell's in-house counsel's to receive notice
12 of the Proposed Settlements, Dell contends their delay resulted
13 from "confusion" and "reasonable mistake." Dell Mot. at 5. Sharp
14 offers no explanation for its failure to opt out prior to the
15 deadline. Finally, it is undisputed that the parties acted in good
16 faith, and did not fail to opt out seeking a tactical advantage.

17 Hitachi argues that neither party has successfully
18 demonstrated excusable neglect. Specifically, Hitachi argues that
19 extending the opt-out deadline retroactively will be prejudicial as
20 it will undermine certainty and deadlines in the case and that the
21 length of the delay weighs in their favor. Furthermore, they argue
22 that the third factor, the explanation for the delay, does not
23 weigh in either Sharp's or Dell's favor. Specifically they note
24 that Sharp's failure to offer any explanation "'largely moots any
25 further inquiry into the other pertinent factors.'" Sharp Opp'n at
26 3 (quoting Demint v. NationsBank Corp., 208 F.R.D. 639, 642 n.5
27 (M.D. Fla. 2002)). As to Dell, they contend that "Dell knew or
28 should have known about the deadline," particularly in light of the

1 numerous other requests for exclusion. Dell Opp'n at 4.

2 **1. Adequacy of Notice**

3 As a preliminary matter, the Court notes that the notice
4 provided in this case was constitutionally adequate. Notice was
5 sent to (and apparently received at) at least one Dell address and
6 multiple Sharp addresses, published in the Wall Street Journal, and
7 posted on the Settlement Administrator's website. The fact that
8 Dell arguably did not receive the class notice does not render the
9 notice constitutionally inadequate. Brannon v. Household Int'l
10 Inc., 236 F. App'x 285, 287 n.1 (9th Cir. 2007) (noting that
11 neither actual nor "individually tailored" notice is
12 constitutionally required). Furthermore, while the success of the
13 procedures is not dispositive, the fact that eighteen corporate
14 families filed timely opt-out notices further indicates notice was
15 adequate.

16 **2. Sharp**

17 As to Sharp, two of the Pioneer factors weigh in their favor.
18 First, it is undisputed that Sharp acted in good faith. Second,
19 Hitachi's suggestion that Defendants will be prejudiced by reduced
20 certainty in deadlines is vague and unconvincing. On the other
21 hand, the DPPs point out that members of the settlement classes may
22 well be prejudiced by including Sharp, a large purchaser of CRTs.
23 This may well be true, but neither Sharp nor the DPPs provide any
24 detail above generalized assertions of prejudice. See DPP Br. at
25 3-4; Saveri Decl. ¶ 9. Without more, the Court does not ascribe
26 significant weight to this factor.

27 On the other hand, the remaining factors weigh strongly
28 against a finding of excusable neglect. First, and most

1 importantly, Sharp has offered no explanation as to why it missed
2 the applicable opt-out deadline aside from mentioning that notice
3 was "inadvertently not . . . sent to outside counsel for the Sharp
4 Plaintiffs." See Benson Decl. ¶ 5. Inadvertence and
5 miscommunication are insufficient excuses. See, e.g., In re Static
6 Random Access Memory (SRAM) Antitrust Litig., No. C 07-01819 CW,
7 2009 WL 2447802, at *2 (N.D. Cal. Aug. 7, 2009) (declining to find
8 excusable neglect due to "miscommunications"); see also Pioneer,
9 507 U.S. at 392 (stating that "inadvertence . . . [does] not
10 usually constitute 'excusable' neglect."). Sharp received notices
11 (sent to the same address used for other settlements Sharp opted
12 out of), and had every opportunity to review the Settlement
13 Administrator's website or publication notice. While Sharp points
14 out that the Settlement Administrator's "dates to remember" page
15 omitted the opt-out deadline, they do not claim they viewed that
16 page or relied on it for notice of the applicable deadline. See
17 Sharp Mot. at 2. Finally, while Sharp characterizes the two week
18 delay in filing a request for exclusion as "de minimis," they fail
19 to note that after filing their request for exclusion, counsel
20 waited an additional twelve days before contacting opposing counsel
21 seeking their position on Sharp's exclusion from the class. These
22 facts are simply insufficient to justify a finding of excusable
23 neglect. Accordingly, Sharp's motion for a retroactive extension
24 of the opt-out period is DENIED.

25 3. Dell

26 Unlike Sharp, Dell's motion provides sufficient detail to
27 demonstrate its neglect was excusable. As with Sharp, the parties
28 agree that Dell has acted in good faith. Similarly, the Court

1 finds that Defendants will not be prejudiced by permitting Dell to
2 opt out of the class. There is at least some support for the DPPs'
3 contention that the members of the settlement class will be
4 prejudiced if Dell, unlike Sharp, is included in the class. The
5 DPPs suggest that Dell's purchases from SDI "exceed \$1.6 billion,"
6 although they provide no source for that number other than stating
7 the information was gleaned from a conversation with Dell's
8 counsel. Saveri Decl. ¶ 9. While the Court has no way to
9 determine what percentage of the \$1.6 billion in purchases Dell
10 considers to be overcharges, and accordingly what amount of that
11 \$1.6 billion would constitute recoverable damages in SDI
12 settlement, the Court finds this is enough detail to tip the
13 prejudice factor further in Dell's favor.

14 Also unlike Sharp, Dell offers an explanation for missing the
15 opt-out deadline. Dell contends that "confusion regarding the opt-
16 out deadline created by the class administrator's settlement
17 website not being properly updated to reflect the opt-out
18 deadline," the alleged "failure to serve Dell with actual notice of
19 the opt-out deadline," and "reasonable mistake regarding the opt-
20 out deadline" caused them to miss the opt-out deadline. Dell Mot.
21 at 5. Furthermore, unlike Sharp, which points to the confusion
22 regarding the Settlement Administrator's "dates to remember" page
23 but does not claim to have ever visited the page or relied on it,
24 Dell states that their counsel visited several pages on the
25 Settlement Administrator's website during the opt-out period and
26 include internet browsing history from the relevant period to prove
27 it. ECF Nos. 2696-2 ("Kent Decl.") ¶ 3; 2696-3 ("Mahurin Whitehead
28 Decl.") ¶¶ 5-9, Ex. 9. While some of Dell's explanations are

1 inapposite, see Silber, 18 F.3d at 1453 (noting that Rule 23 does
2 not require actual notice, only the best notice practicable), the
3 Court finds this explanation shows an appreciable level of
4 diligence and rises above the vague assertions of miscommunication
5 and inadvertence other courts have rejected. See Pioneer, 507 U.S.
6 at 392; SRAM, 2009 WL 2447802, at *2. Accordingly, Dell has also
7 tipped the balance of this factor in its favor.

8 While the Court finds the length of delay factor weighs
9 against Dell for the same reasons it weighed against Sharp, the
10 Court finds Dell has demonstrated excusable neglect. Accordingly,
11 Dell's motion for a retroactive enlargement of the time to opt out
12 is GRANTED.

13 B. Confirmation of Sharp's Opt-Out Attempt

14 Having found that Sharp's neglect is inexcusable, the Court
15 must now determine if Sharp can demonstrate some other ground for
16 its exclusion from the Proposed Settlements. Specifically, Sharp
17 argues that its litigation conduct throughout the relevant period
18 is sufficient to have effectively opted them out of the Proposed
19 Settlements. As a preliminary matter, however, Hitachi disputes
20 whether such an inquiry is even appropriate. Instead, Hitachi
21 contends that the excusable neglect standard is the sole test for
22 determining the efficacy of an opt-out in the Ninth Circuit. In
23 doing so, Hitachi relies on Chief Judge Wilken's statement in In re
24 Static Random Access Memory (SRAM) Antitrust Litigation that "[t]he
25 standard for determining whether [a plaintiff] should be allowed to
26 opt-out of the class after the applicable deadline is whether its
27 failure to comply with the deadline is the result of 'excusable
28 neglect.'" 2009 WL 2447802, at *2; see also Silber, 18 F.3d at

1 1455 (remanding to the district court to analyze whether the party
2 seeking to opt out could show excusable neglect).

3 In SRAM, the Court denied Intel's motion for a retroactive
4 enlargement of time to opt out of the certified class. Despite
5 numerous electronic, mail, and publication notices by the
6 Settlement Administrator, at least one of which was received before
7 the opt-out deadline, Intel failed to timely return an opt-out
8 notice. Id. at *1. After being informed of its failure to opt out
9 by a supplier, Intel immediately contacted outside counsel and
10 several defendants to inform them they intended to opt out, and
11 filed an unopposed motion to do so. Id. The Court denied the
12 motion, reasoning that Intel's only explanation -- an "honest
13 mistake" resulting from "miscommunications" -- was insufficiently
14 detailed to justify granting a retroactive enlargement of the
15 deadline. Id. at *2-3.

16 Sharp disagrees that excusable neglect is the sole basis for
17 concluding it has effectively opted out of the class, instead
18 arguing that the continued prosecution of its case throughout the
19 opt out period was sufficient to express "the operating
20 understanding of all relevant parties: Sharp is not a member of the
21 settlement class." Sharp Mot. at 3. In support of this
22 proposition Sharp relies primarily on two cases, In re Brand Name
23 Prescription Drugs Antitrust Litigation, 171 F.R.D. 213 (N.D. Ill.
24 1997) and McCubbrey v. Boise Cascade Home & Land Corp., 71 F.R.D.
25 62 (N.D. Cal. 1976). In McCubbrey, the Court granted final
26 approval and class certification to a settlement releasing class
27 member's claims against a homebuilding company. 71 F.R.D. at 64-
28 65. Prior to doing so, notice was sent via mail and publication to

absent class members that "suggest[ed] that inaction will result in barring future litigation, not automatic termination of present suits." Id. at 68. The Defendant sought an order enjoining twenty state court actions filed by members of the putative class before, during, and after opt-out period. Id. at 65. Pointing to the due process implications of binding absent class members, Judge Peckham concluded that "it seems clear that institution of litigation . . . constitutes an effective -- indeed, strident -- expression of a desire not to acquiesce in an impending class settlement." Id. at 71.

In opposition, Hitachi suggests that, even under Sharp's preferred view, Sharp cannot prevail. Sharp Opp'n at 5. Specifically, Hitachi notes the existence of cases holding that the "mere pendency and continued prosecution of a separate suit, which the litigant instituted before commencement of the 'opt-out' period in a related class action, neither registers nor preserves a litigant's 'opt out' of the related class action." Demint v. NationsBank Corp., 208 F.R.D. 639, 641 (M.D. Fla. 2002); see also Bowman v. UBS Fin. Servs., Inc., No. C-04-3525, 2007 WL 1456037, at *1-2 (N.D. Cal. May 17, 2007) (quoting the language from Demint, and citing McCubbrey for the narrower position that filing suit "during [the] opt-out period" was sufficient to express the desire to opt out) (emphasis added); In re Prudential Secs. Inc. Ltd. P'ships Litig., 164 F.R.D. 362, 370 (S.D.N.Y. 1996) ("It is well-established that pendency of an individual action does not excuse a class member from filing a valid request for exclusion."), aff'd 107 F.3d 3 (2d Cir. 1996); Holmes v. CSX Transp., No. Civ.A. 97-3863, 1999 WL 447087, at *4 (E.D. La. 1999) ("Simply continuing

1 with the present lawsuit, in a different court than the class
2 action suit, is not sufficient to provide the court with notice of
3 plaintiff's intent to opt-out of the class.").

4 Hitachi is right. Assuming arguendo that in some cases a
5 party's litigation conduct may sufficiently demonstrate its intent
6 to be excluded from the class, this is not such a case. First,
7 unlike in McCubbrey, the notice in this case was constitutionally
8 sufficient, and Sharp's case against the Settling Defendants was
9 filed prior to the opt-out period. See Bowman, 2007 WL 1456037, at
10 *1 ("Here, unlike the notice at issue in McCubbrey, the Class
11 Notice complies with the due process requirement that 'the options
12 available to class members and the consequences of their elections
13 be detailed with sufficient clarity to afford absent members a
14 realistic opportunity to evaluate alternative options available to
15 them.'") (quoting McCubbrey, 71 F.R.D. at 67). Second, the weight
16 of authority cited by Hitachi is clear: filing an individual case
17 prior to the opt-out period and continuing to litigate that case
18 through the opt-out period is insufficient. Id. at *2 (collecting
19 cases); see also In re Prudential Ins. Co. of Am. Sales Pracs.
20 Litig., 177 F.R.D. 216, 238 (D.N.J. 1997); In re VMS Secs. Litig.,
21 No. 89 C 9448, 1992 WL 203832, at *3 (N.D. Ill. 1992); cf. Brannon,
22 236 F. App'x at 287 (concluding that ongoing negotiations between
23 the individuals and defendants "did not exclude [plaintiffs] from
24 compliance with the judicially ordered exclusion procedures");
25 Penson v. Terminal Transp. Co., Inc., 634 F.2d 989, 996 (5th Cir.
26 1981) (rejecting the argument that an individual's filing of an
27 EEOC charge prior to the entry of a consent decree prevented the
28 application of claim preclusion). Finally, Sharp's reliance on

1 Brand Name Prescription Drugs is misplaced. In that case, the
2 party seeking to confirm the effectiveness of its opt-out request
3 mistakenly sent the required opt-out notice to the court rather
4 than the appropriate post office box. 171 F.R.D. at 215-16.
5 Furthermore, to the extent the case concluded that "[t]he clearest
6 evidence of a desire to pursue its own litigation against the
7 defendants is the filing of its case against the same 23
8 defendants," it is contrary to the clear weight of authority
9 identified above.

10 Accordingly, Sharp has failed to show that its actions during
11 the opt-out period sufficiently demonstrated its intent to be
12 excluded from the Proposed Settlements. As a result, their motion
13 is DENIED.

14
15 **IV. CONCLUSION**

16 For the reasons set forth above, the Court GRANTS Dell's
17 motion for a retroactive enlargement of time to opt out of the
18 Proposed Settlements. Dell's alternative motion to confirm its
19 prior opt-out is DENIED as moot. The Court DENIES Sharp's motions
20 to confirm its opt-out request and its alternative motion for a
21 retroactive enlargement of time to opt out of the Proposed
22 Settlements.

23
24 IT IS SO ORDERED.

25
26 Dated: August 20, 2014


UNITED STATES DISTRICT JUDGE